

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 1048

INTRODUCER: Regulated Industries Committee and Senator Baker

SUBJECT: Construction Bonds

DATE: March 15, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	Fav/CS
2.	Gizzi	Yeatman	CA	Pre-meeting
3.			JU	
4.			GA	
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This committee substitute (CS) requires a contractor who has obtained a payment bond under s. 255.05(1)(a), F.S., to record the bond in the Official Records in the county where the improvement is conducted. The CS prohibits the local issuing authority for a building permit from inspecting the improvement until the issuing authority has either a copy of the contractor's recorded payment bond on file or the contracting public entity has filed a notarized statement that the contract is exempt from the payment bond requirement.

The CS requires a contractor to provide an owner with a General Statement of Owner's Rights and Responsibilities under Florida's Construction Lien Law (General Statement), that includes copies of the following five statutory forms: (1) notice of commencement; (2) release and waiver of lien upon progress payment; (3) release and waiver of lien upon final payment; (4) request for sworn statement of account; (5) and contractor's final payment affidavit. The CS also requires a copy of the General Statement be signed by the owner and filed with the building permit application at the local permitting authority before processing the building permit application.

The CS deletes the requirement that the construction lien law notice be included in the construction contract between contractor and owner.

The CS changes the date a Notice of Commencement expires to 90 days after the day of the final furnishing of all labor, services, and materials required by the direct contract, and deletes the provision that states that a Notice of Commencement expires if work does not commence within 90 days.

The CS also creates new prerequisites to the inspection of improvements by local issuing authorities and provides certain exceptions to these requirements.

This CS amends the following sections of the Florida Statutes: 255.05, 713.015, 713.06, 713.09, 713.13, 713.135, 713.16, 713.18, 713.22, 713.23, and 713.24. This CS creates section 713.137, Florida Statutes.

II. Present Situation:

Surety

In Florida, “surety insurance” is defined to include both payment and performance bonds.¹ A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers; whereas a performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions.²

These types of bonds involve a surety company that is paid a premium by a principal (i.e. general contractor) and agrees to stand in the place of the principal in the event of default to either the performance or payment of the contract.³ Unlike customary two-party insurance agreements which involve the insurer and the insured, a surety agreement is a tripartite agreement that consists of:

- The obligee;
 - The person purchasing the performance in a performance bond
 - The subcontractor/supplier expecting payment from the contractor in a payment bond
- The principal (i.e., the contractor); and
- The surety, who provides the bond to protect against the principal’s default.

Payment Bonds for Public Projects

Section 255.05 F.S., requires any person that enters into a formal contract over \$100,000 with the state, a county, a city, a political subdivision, or other public authority for the construction, completion, or repair of a public building, to deliver a payment and performance bond with a state authorized surety insurer to the public owner.⁴ Pursuant to s. 225.05(1)(a), F.S., the following information must be provided on the first page of a payment or performance bond:

¹ Section 624.606 (1)(a), F.S.

² BLACK’S LAW DICTIONARY 1138 (6th ed. 1990) (defining “performance bond” as a “[s]urety bond which guarantees that the contractor will fully perform the contract and guarantees against breach of contract ... Proceeds of bond are used to complete contract or compensate for loss in the event of nonperformance.” citing *The Miller Act*, 40 U.S.C. 3131(b)(1) and (2)).

³ Toomey, Daniel and Tamara McNulty, *Surety Bonds: A Basic User’s Guide for Payment Bond Claimants and Obligees*, 22 Construction Lawyer 5 (Winter 2002) (American Bar Association 2002).

⁴ See s. 255.05, F.S.

- The name, principal business address, and the phone number of the contractor, surety, and owner of the property being improved; and, if different from the owner, the contracting public entity;
- The contract number assigned by the contracting public entity; and
- A description of the project being improved that is sufficient to identify it (i.e., a legal description or the property's street address) and a general description of the improvement.⁵

Section 225.05(2)(a)2., F.S., requires a claimant that is not in privity with the contractor and who has not received payment for his or her labor, services, or materials to provide written notice to both the contractor and the surety stating that he or she intends to make a claim against the bond for payment. The Notice of Nonpayment under s. 225.05, F.S., is required to state the amounts claimed to be owed and due to the claimant.

No performance or payment bond is required for state contracts that are \$100,000 or less. In addition, if a state project is between \$100,000 and \$200,000, a state agency can exempt the contractor from the bond requirement pursuant to delegated authority from the Secretary of the Department of Management Services.⁶

Florida Construction Lien Law

A construction lien⁷ is an equitable device designed to protect individuals that enhance an owner's property who are not in direct privity with the owner, such as laborers and suppliers, who remain unpaid after the owner has paid the general contractor.⁸ Under current law, contractors cannot place a lien on public or state owned lands and buildings to secure payment for construction on public buildings and land. If an owner and a contractor wish to exempt out of the construction lien provision, s. 713.02(6), F.S., provides that an owner can require a contractor to furnish a payment bond under s. 255.05, F.S., instead.

Construction lien statutes set forth a right of action that did not exist at common law, and thus construction liens are purely statutory. The lien law protects subcontractors, sub-subcontractors, laborers, and suppliers of materials by allowing them to place a lien to ensure payment on the property receiving their services. Another purpose of lien law is to protect owners by requiring subcontractors to provide a notice of possible liens, thereby preventing double payments to contractors and subcontractors, material suppliers, or laborers for the same services or materials.

Part I of ch. 713, F.S., requires various notices, demands and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands and requests be in a statutory form. The following notices are complicated but important for the homeowner to understand during this process: Notice of Commencement,

⁵ Section 255.05 (1)(a), F.S.

⁶ *Id.*

⁷ The term "lien" is not defined in ch. 713, F.S., but can be found elsewhere in the Florida Statutes to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." See ss. 726.102(8) and 727.103(9), F.S.

⁸ *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So.2d 623 (Fla. 1995) See also *Hiers v. Thomas*, 458 So.2d 322 (Fla. 2nd DCA 1984).

Notice to Owner, Claim of Lien, Notice of Termination, Waiver and Release of Lien, Notice of Contest of Lien, Contractor's Final Payment Affidavit, and Demands of Written Statement of Account. The procedure that a homeowner follows in paying for improvements under part I of ch. 713, F.S., determines whether a payment is proper or improper.

An improper payment is a payment made by a homeowner to a contractor that does not fall within the proper payment defense to a lien under s. 713.06(3), F.S. This can occur if the homeowner fails to file a Notice of Commencement or fails to obtain a release of waiver of lien after receiving notice to the owner and paying the subcontractor. An improper payment could result in the homeowner paying twice for the same improvement because the payment is not credited against the owners' potential liability for payment of liens.⁹

Homeowner Education

Under current law, homeowners are required to be provided with three different forms of notification from the following parties: the contractor, the county or city building officials, and the lender.¹⁰ The purpose of these notifications is to educate homeowners on Florida Construction Lien Law before a lien can take effect. In most circumstances, the contractor is the first party to have contact with the homeowner, followed by the building officials or the lender.

Contractor

Pursuant to s. 713.015, F.S., a contractor is required to include the following notice regarding Florida Construction Lien Law in any direct contract with a homeowner for improvements to real property consisting of single or multiple family dwellings up to four units, that is greater than \$2,500:

According to Florida's Construction Lien Law (sections 713.001-713.37, Florida Statutes), those who work on your property or provide materials and services and are not paid in full have a right to enforce their claim for payment against your property. This claim is known as a construction lien. If your contractor or a subcontractor fails to pay subcontractors, sub-subcontractors, or material suppliers, those people who are owed money may look to your property for payment, even if you have already paid your contractor in full. If you fail to pay your contractor, your contractor may also have a lien on your property. This means if a lien is filed your property could be sold against your will to pay for labor, materials, or other services your contractor or subcontractor may have failed to pay. To protect yourself, you should stipulate in this contract that before any payment is made, your contractor is required to provide you with a written release of lien from any person or company that has provided you a "Notice to Owner." Florida's Construction Lien Law is complex and it is recommended that you consult an attorney.¹¹

⁹ The statutory procedures that homeowner must follow to pay for improvements are provided in Part I, of ch. 713, F.S. See Dudley, Fred R., *Florida Construction Liens: Representing the Residential Owner*, 79 Fla. Bar J. 34 (Dec. 2005) See also Comm. on Regulated Industries, Fla. Senate, *Review of the Florida Construction Lien Law* (Interim Project 2009-124) (Oct. 2008).

¹⁰ See ss. 713.015, 713.135, and 713.3471, F.S.

¹¹ Section 713.015, F.S.

The notice must be printed in no less than 12-point font and must be capitalized in boldface type on the front page of the contract or on a separate page that is signed and dated by the homeowner.¹²

Building Officials

Section 713.135, F.S., requires a county or city that issues a building permit to provide permit applicants with an explanatory statement on Florida Construction Lien Law drafted by the Department of Business and Professional Regulation. The local authority that issues the permit can deliver this statement to the owner by mail, electronic mail, facsimile, or personal delivery.¹³ In addition, the county or city must inform any applicant who is not the person whose right, title and interest is subject to attachment, of his or her obligation to deliver this statement to the person whose property is subject to attachment in good faith.¹⁴

Lenders

The lender is the third party that is required to give the owner notice on Florida Construction Lien Law. Section 713.3471(1), F.S., requires the lender to provide the following warning to homeowners, prior to making a loan disbursement on a residential construction loan directly to the owner:

Your lender is making a loan disbursement directly to you as the borrower, or jointly to you and another party. To protect yourself from having to pay twice for the same labor services, or materials used in making the improvements to your property, be sure that you require your contractor to give you lien releases from each lienor who has sent you a notice to owner each time you make a payment to your contractor.¹⁵

The notice must be in bold type that is larger than the rest of the text on the page and must be delivered by mail, electronic mail, facsimile, or personal delivery. Similar to the notice provided by the contractor, this requirement does not apply if the homeowner is a contractor licensed under ch. 489, F.S., or is a person who creates parcels or offers parcels for sale or lease in the ordinary course of business.

Notice of Commencement

A recorded Notice of Commencement provides constructive notice that claims of lien may be recorded and will have priority over any conveyance, encumbrance, or demand not recorded against the real property prior to the time the notice is recorded.¹⁶ The Notice of Commencement must be recorded with the clerk of the court where the property is located by the owner or the owner's agent and a certified copy or a notarized statement must be posted at the jobsite, before a contractor can begin improvements to real property or recommence any improvement after default or abandonment.¹⁷ Liens shall attach at the time of recordation, however in the event that

¹² Section 713.015(1), F.S. (**Note**, "This section does not apply when the owner is a contractor licensed under chapter 489 or is a person who created parcels or offers parcels for sale or lease in the ordinary course of business" *see* s. 713.015(2)(c), F.S.)

¹³ Section 713.135(1)(b), F.S.

¹⁴ Section 713.135(c), F.S.

¹⁵ Section 713.3471(1), F.S.

¹⁶ Section 713.13(3), F.S.

¹⁷ Section 713.13(1)(a), F.S.

a Notice of Commencement is not filed, liens from certain materialman or laborers under ss. 713.05 and 713.06, F.S., “shall attach and take priority as of the time the claim of lien is recorded”.¹⁸

Pursuant to s. 713.13(1)(a), F.S., the Notice of Commencement must include the following information pursuant to the form provided in paragraph (1)(d):

- A legal description of the property and the street address and the tax folio number, if available;
- A general description of the improvement;
- The name and address of the owner, the owner’s interest in the site of improvement, and the name and address of the fee simple titleholder, if other than the owner;
- The name and address of the contractor;
- The name and address of the surety on the payment bonds and the amount of such bond, if applicable;
- The name and address of any person making a loan for the construction of the improvements; and
- The name and address of any person designated to receive notices, and the anticipated expiration date if different from one year.

The Notice of Commencement is valid for a period of one year, unless otherwise provided. Any payments made by the owner after this time period, are considered improper payments.¹⁹ If the improvement(s) described in the Notice are not commenced within 90 days after the Notice was recorded, the Notice of Commencement becomes “void and of no further effect”, which results in any payments after that time to also classify as improper payments.²⁰

For contracts greater than \$2,500, the permit applicant must file either a certified copy of the recorded notice or a notarized statement that such notice has been filed with the building permit authority prior to the first inspection on the property.²¹ In absence of this filing, no subsequent inspections may be performed or approved.

Any county or city that issues a building permit is required to provide the following notice in 14-point, capitalized, bold type on the face of each permit card that is provided to the person applying for a building permit:

Warning to owner: your failure to record a notice of commencement may result in your paying twice for improvements to your property. A notice of commencement must be recorded and posted on the job site before the first inspection. If you intend to obtain financing, consult with your lender or an attorney before recording your notice of commencement.²²

¹⁸ Section 713.07(2), F.S.

¹⁹ Section 713.13(1)(c), F.S.

²⁰ Section 713.13(2), F.S.

²¹ Section 713.135(1)(d), F.S. (**Note**, for a direct contract to repair or replace an existing heating or air conditioning system, the threshold is for contracts greater than \$7,500)

²² Section 713.135(1)(a), F.S.

However, a Notice of Commencement does not have to be recorded prior to the issuance of a building permit.²³

Demand for Copy of Contract and Statements of Account

A copy of the lienor or owner's contract and a statement of the amount due must be provided upon written demand of an owner or lienor contracting or employed by the other party, at the expense of the demanding party.²⁴ A request for a sworn statement of account must be in accordance to the statutory format prescribed in s. 713.16(3), F.S. Failure to provide such information within 30 days or furnishing a false or fraudulent statement may result in a loss of that person's right to recover under the lien or attorneys fees.²⁵

Service

Section 713.18(1), F.S., provides that service of notices, claims of lien, affidavits, assignments, and other instruments must be served by personal service, registered or certified mail, overnight or second-day mail, or if the other types of service cannot be accomplished - by posting on the premise.²⁶

III. Effect of Proposed Changes:

Payment Bonds for Public Projects

The CS amends s. 255.05(1), F.S., to require a contractor who is issued a payment bond for a public construction project to record the payment bond in the public records of the county in which the improvement is located. The bond must state the bond number assigned by the surety on its front page. The CS also prohibits the local issuing authority from inspecting an improvement until the issuing authority has a recorded payment bond on file or the contracting public entity has filed a notarized statement stating that the contract is exempt from the requirement for a payment bond. The CS exempts installation of temporary electrical service or other temporary utility service, land clearing, and other preliminary site work from this requirement.

Florida Construction Lien Law

The CS substantially amends the manner in which an owner receives information regarding Florida Construction Lien Law. The CS would require the majority of the information regarding construction lien law to be given to the owner at the beginning of the construction process. The CS requires the contractor to provide the homeowner with a General Statement of Owner's Rights and Responsibilities, under Florida's Construction Lien Law (General Statement). The new General Statement provides information on the construction lien law along with an elaborate a four step process to help protect owners against double payment, which include:

- Step 1: Information about the Notice of Commencement;
- Step 2: Information about monitoring important notices that the homeowner receives;

²³ Sections 713.135(1)(d) and (e), F.S.

²⁴ Section 713.16 (1), F.S.

²⁵ Section 713.16 (4), F.S.

²⁶ See ss. 713.18(1)(a)-(c), F.S.

- Step 3: Information about obtaining waivers each time the homeowner pays the contractor; and
- Step 4: Information about obtaining a contractor's final payment affidavit.

The General Statement provides additional information to hire a licensed contractor, cautions when paying large deposits, consulting legal advice when necessary, and contact information for the Florida Homeowners' Construction Recovery Fund and the Construction Industry Licensing Board. The General Statement also includes copies of the following statutory forms: a Notice of Commencement, a Waiver and Release of Lien upon Progress Payment, a Waiver and Release of Lien upon Final Payment, a Request for Sworn Statement of Account, and a Contractor's Final Payment Affidavit.

The CS requires a contractor to provide this General Statement to be signed by the owner for every direct contract related to improvements to real property, and delivered with the building permit application to the local permitting authority.

The CS deletes the current requirement in s. 713.015(1), F.S., which requires a contractor to include a statutory warning in every direct contract between the contractor and home owner, and replaces it with the requirement that the contractor deliver the General Statement.

The CS amends the notice requirements for proper payment for liens of persons not in privity with the owner to require the contractor to include in his notice that the homeowner should require a written waiver and release of lien from the subcontractor to protect against liens. The amended notice also instructs the owner to refer to the General Statement for additional information.

The CS amends s. 713.13(1)(c), F.S., to change the expiration of the Notice of Commencement from one year, or the amount of time specified by the homeowner, to 90 days after the day of final furnishing of all labor, services, and materials required by the direct contract, including any change orders, or on the effective date of the Notice of Termination. The CS deletes certain provisions stating that any payments made after the expiration of the Notice of Commencement are improper. The CS also amends the warning regarding the expiration of the Notice of Commencement in the statutory Notice of Commencement form in s. 713.13(1)(d), F.S., to reflect the change of the expiration to 90 days after the final furnishing of all labor, services, and materials required by the contract.

The CS amends s. 713.135(1), F.S., to require permit applicants to submit a signed and dated General Statement to the issuing authority before a building permit request can be processed. The CS also requires each permit to include a statement that the contractor's payment bond, if the project is bonded, must be recorded and posted at the job site. The CS requires local permitting authorities to provide available copies of the General Statement to permit applicants and deletes the previous requirement that the local permitting authority provide the applicant with a printed explanatory statement by the Department of Business and Professional Regulations on Florida Construction Lien Law.

The CS creates s. 713.137, F.S., to list certain prerequisites for inspection of improvements. The CS requires that:

- The issuing authority have a signed copy by the homeowner of the general statement of an Owner's Rights and Responsibilities under Florida's Construction Lien Law;
- The issuing authority have a copy of the contractor's recorded payment bond or a notarized statement of the contractor or owner stating that a payment bond was not required; and
- The issuing authority have a copy of the Notice of Commencement or a notarized statement that the notice has been filed for recording and the information in the notice is consistent with the building permit application, complete, and legible.

The CS provides the following exceptions to these prerequisites:

- The installation of temporary electrical service or other temporary utility service, land clearing or other preliminary site work;
- For improvements pursuant to a direct contract in an amount of \$5,000 or less;
- Repair or replacement of a heating or air-conditioning system pursuant to a direct contract in the amount of \$7,500 or less; and
- The installation of a solar hot water system pursuant to a direct contract in the amount of \$7,500 or less.

The CS amends s. 713.16, F.S., to require that a demand for a copy of contract and statement of account, include a description of the project, including the names of the owner, the contractor, and the lienor's customer, that is sufficient for the lienor to properly identify the account in question.

The CS also amends s. 713.18, F.S., to include a premium mailing option offered by the U.S. Postal Service with international transportation and delivery by FedEx Express as an additional means for serving notice. The CS provides that incomplete address information may be completed and formatted according to the United States Postal Service address standards without affecting the validity of service.

The CS shall take effect on October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The CS requires contractors to provide a detailed explanation on Florida Lien Law to the homeowner upfront at the signing of the contract. By providing this information at the beginning of the construction process, it ensures that the homeowner has the necessary information to protect against liens and understand the process. Contractors may incur some additional costs in altering their contracts and supporting documents.

The CS changes the expiration of the Notice of Commencement to 90 days after the final furnishing of all labor, services, and materials required by the direct contract, including any change orders or on the effective date of the Notice of Termination. The CS also deletes the provision that a Notice of Commencement expires if construction does not begin within 90 days and any payments thereafter are considered improper. These changes could help homeowners avoid improper payments.

C. Government Sector Impact:

Local permitting authorities may experience a reduction in expenses related to homeowner education as this information will be included in the General Statement provided by Contractors.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 3, 2010:

The CS requires a contractor who is issued a payment bond to record the payment bond in the Official Records of the county where the improvement is made.

The CS deleted section 13 of the bill, which made changes to s. 713.29, F.S., regarding attorney fees.

The CS changed the effective date of the bill to October 1, 2010.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
